

ORIGINAL

SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA

2010 JUN -9 AM 8:17

JEANNE HICKS, CLERK /

BY: SBagnall

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

THE STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

P1300

No. CR 2008-1339

BEFORE: THE HONORABLE THOMAS B. LINDBERG
JUDGE OF THE SUPERIOR COURT
DIVISION SIX
YAVAPAI COUNTY, ARIZONA

PRESCOTT, ARIZONA
THURSDAY, JUNE 3, 2010
8:22 A.M.

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

MOTION IN LIMINE REGARDING ANONYMOUS E-MAIL

ROXANNE E. TARN, CR
Certified Court Reporter
Certificate No. 50808

JUNE 3, 2010
8:22 A.M.

MOTION IN LIMINE REGARDING ANONYMOUS E-MAIL

APPEARANCES:

FOR THE STATE: MR. JOE BUTNER AND MR. JEFF
PAUPORE.

FOR THE DEFENDANT: MR. JOHN SEARS, MR. LARRY
HAMMOND AND MS. ANNE CHAPMAN.

THE COURT: I had a couple of issues that you
may need to have decisions on before we get to the opening
statements.

State filed a motion in limine with
regard to an anonymous e-mail. I received a response, as
well. And I think it is something we ought to discuss at
this point, and probably given that there may be reference by
one side or the other to that.

Mr. Butner or Mr. Paupore.

MR. BUTNER: Judge, it is clearly a hearsay
document. We don't know who it came from. It is anonymous
in origin. It was investigated, and we never could find out
who did it. We investigated Mr. DeMocker's statements of how
it may have originated from somebody in the jail that he had
conversation with through the jail vents. We were never able
to find out that kind of information or validate this e-mail
from any source, so to speak.

THE COURT: I recognize the clear hearsay

1 issue in connection with this and the contents. And the
2 reason why it is being sought to be admitted would be for the
3 contents of the document itself.

4 MR. BUTNER: But there is just no foundation
5 for it.

6 THE COURT: Tell me about how you see *Gibson*
7 and *Machado* relating to that?

8 MR. BUTNER: Judge, I understand that the
9 defense has an argument that this somehow would play into
10 their defense of third-party culpability, but the Rules of
11 Evidence still are in place in this case and all other
12 criminal cases. And this is basically a shot from out of the
13 dark with no adequate foundation, unreliability written all
14 over it. It could have been something concocted by anybody,
15 so to speak. That is the whole point. It could have been
16 concocted.

17 THE COURT: What does *Machado* say about that?

18 MR. BUTNER: I think it says the Evidence Rule
19 still requires foundation. And it is still hearsay, so it
20 should not be admissible.

21 THE COURT: Mr. Sears.

22 MR. SEARS: Thank you, Your Honor.

23 First, I don't want to lose sight of the
24 fact that this motion is untimely, without question. The
25 State has not filed --

1 THE COURT: But it saves an objection at the
2 time of the proffer of the evidence, the purported proffer of
3 the evidence which would have to be considered at the time
4 that that is made. Rather than approach it --

5 MR. SEARS: This is a year old, Your Honor.
6 The anonymous e-mail is very nearly a year old. The
7 investigation was completed by the Yavapai County Attorney's
8 Office regarding this last summary.

9 THE COURT: I am considering it, so if you
10 would move on to that issue.

11 MR. SEARS: Well, let's talk about *Machado* and
12 *Gibson* and what they say. *Gibson* explained *Fulminante*.
13 *Fulminante* has been the law in Arizona for 32 years. *Gibson*
14 has been the law in Arizona for eight years.

15 The only requirement for third-party
16 culpability evidence is that it is relevant and that it is
17 not 403 prejudicial. There is no requirement, contrary to
18 the State's assertion, that it be proved beyond a reasonable
19 doubt, that it be proved to any standard. *Machado* says
20 404(b) does not apply to that evidence for good reason. This
21 is all grounded in the defendant's Sixth Amendment right to
22 present a defense.

23 THE COURT: What about foundation and hearsay
24 objections?

25 MR. SEARS: It doesn't matter in this case.

1 The argument is that this information was submitted. The
2 arguments that the State makes that it lacks foundation, that
3 it is hearsay, are simply arguments that go to the weight of
4 it. They had decided, for some reason after they tried to
5 run this to ground, that it must be a fabrication. That is
6 consistent with the way in which the State has looked at any
7 evidence that doesn't point to Mr. DeMocker. They dismiss it
8 out of hand. They refuse to accept it as a possible
9 alternative.

10 THE COURT: It is clearly hearsay. What is
11 your proposal for how you lay the foundation for it? Are you
12 going to testify? Who is testifying with regard to that?

13 MR. SEARS: I would put on Detective Randy
14 Schmidt, if the State doesn't call him. Detective Schmidt is
15 the one that investigated this. He wrote a 15-page
16 supplemental report. He conducted the actual investigation.
17 He conducted the investigation into the authenticity on the
18 document. He traced the document to an Internet cafe in
19 North Central Phoenix.

20 THE COURT: My understanding, for purposes of
21 the record, is an e-mail comes to your office.

22 MR. SEARS: It comes to me, and it was
23 addressed at the same time to Mr. Butner, with an incorrect
24 e-mail address to Mr. Butner. A second, briefer e-mail came
25 to me from the same IP address, saying that it bounced back,

1 would I forward it to Mr. Butner, which is exactly what we
2 did.

3 The State has investigated this matter
4 and concluded that they know where this was sent from. They
5 know the date it was sent from. They know the time it was
6 sent from. They know exactly how long the person using the
7 computer in the Internet cafe was on-line. They know what
8 the person did. They created this anonymous e-mail account.
9 They searched for my address, for Mr. Butner's address, for
10 photographs of us, then they composed and sent these e-mails.
11 They paid cash. They couldn't be identified. The trail went
12 cold at that point.

13 They also investigated possible sources
14 inside the jail and concluded that they could not identify
15 the person that spoke to Mr. DeMocker inside the jail with
16 similar information exactly one month before. That is the
17 foundation for all of this.

18 It is -- if you look at it this way, how
19 is this any different than the allegations against
20 Mr. DeMocker? The allegations against Mr. DeMocker are
21 entirely circumstantial. They are not based on --

22 THE COURT: They are not subject to a hearsay
23 objection.

24 MR. SEARS: Well, actually, much of it is, but
25 we have had that hearing before. But if this information

1 comes -- looking at the low bar set by *Gibson*, which was
2 lowered further by *Machado*, how can we say that because
3 Mr. DeMocker doesn't have a witness to come forward and say
4 "I killed Carol Kennedy," or "I will tell you how I did it,"
5 he is not permitted to present this third-party culpability
6 defense.

7 He has this information. There are
8 inherent details inside this e-mail that even the
9 investigator conceded show that the person had some degree of
10 familiarity with the inside of the victim's home beyond what
11 was available in the public record. There are aspects of the
12 allegations in this e-mail that are consistent with our
13 investigation of the physical injuries suffered by Carol
14 Kennedy.

15 It involves Mr. Knapp, but it doesn't say
16 that Mr. Knapp is the killer. It has a different spin on
17 that. This is not a suggestion that Mr. Knapp killed Carol
18 Kennedy. This is a suggestion that Mr. Knapp brought down
19 the people that, by his conduct, brought the people that
20 eventually killed Carol Kennedy to her house. That is the
21 allegation in this case. It is not wild speculation. It is
22 based on this information. It is investigated.

23 The State's own investigation confirms
24 the extrinsic parts of this; mainly that there was such an
25 e-mail, where it was sent from, the date it was sent from,

1 how it was created. And what you can infer from that is that
2 the person inside the jail and the person who sent the
3 e-mail, whether they are one and the same person, was
4 successful in doing what they wanted to do, which was to
5 remain anonymous. They wanted to mask their identity, and
6 they were able to do that.

7 The State can argue, I suppose, that this
8 is a fabrication or concoction of people, and that just
9 simply goes to the weight of this evidence. But to say that
10 Mr. DeMocker is stopped at the door from raising this
11 third-party culpability defense because the document that
12 creates the idea of it is in and of itself hearsay, I think
13 does damage to both *Gibson* and *Machado*.

14 I think those cases stand for a different
15 proposition. The proposition is that in Arizona as
16 elsewhere, *Holmes versus South Carolina*, a United States
17 Supreme Court case that teaches us about the way in which
18 this comes in, that previous practices, the practice in
19 Arizona between 1978, when *Fulminante* was decided, and 2002
20 when *Gibson* was decided, to greatly limit a defense ability
21 to put on third-party culpability evidence is not the law,
22 never was the law. And anyone that interpreted *Fulminante*
23 that way was just reading it wrong.

24 And *Machado* takes us further down the
25 road and tells us that if 404(b) does not apply, then there

1 is no burden on the defendant to prove by any standard of
2 evidence that the acts alleged to be part of this third-party
3 culpability defense actually took place. *Machado* explains
4 just why. It is what I've said, that the defendant has a
5 right to put on a defense. A defendant can't make wild
6 utterly unsupported allegations and expect to have them
7 considered. That is not what this is. This is information
8 that came in a particular way.

9 And the suggestion will be that the
10 police followed it to a point, gave up, dead-ended, and then
11 decided to turn back to the idea that Mr. DeMocker must have
12 planted this. They refuse to accept the idea that it might
13 be true, which is a theme that you have heard in this case,
14 and one that I expect you will hear throughout the trial in
15 this case. That is what the police do. Every time they get
16 a piece of evidence that doesn't fit with their story that
17 points only to Mr. DeMocker, not only do they reject it out
18 of hand, they try to somehow turn that into a fabrication or
19 a construct of Mr. DeMocker or his defense.

20 To simply say that it is hearsay and
21 inadmissible is looking in the wrong window, Your Honor.
22 That is not what the law requires.

23 THE COURT: You concede it is hearsay,
24 obviously.

25 MR. SEARS: Well, it is an out-of-court

1 statement by a person who is presumptively unavailable
2 because they can't be located. The question is whether it is
3 offered for the truth.

4 THE COURT: Offered for the truth of the
5 matter asserted. Thank you.

6 Mr. Butner.

7 MR. BUTNER: Judge, you talked about a 403
8 analysis. It is clearly unfairly prejudicial. And the
9 reason that it is unfairly prejudicial is because you can't
10 find anybody to cross-examine concerning this thing. It is
11 hearsay, classic hearsay, and it is offered for the truth of
12 the matter asserted. We have no foundation for this
13 document. I mean -- and it violates *Crawford*, too, in terms
14 of having somebody to confront, to cross-examine --

15 THE COURT: State doesn't have a right to
16 confrontation like the defendant does.

17 MR. BUTNER: I understand that, Judge, but
18 that is what hearsay is all about, having somebody to
19 confront and cross-examine. And Rule 802, I mean, it is
20 clearly inadmissible. It is a hearsay document offered for
21 the truth of the matter asserted. The declarant is unknown
22 and unavailable. There is no foundation for it. It is
23 prejudicial.

24 THE COURT: Doesn't *Machado* only require the
25 403 analysis, not the hearsay analysis?

1 MR. BUTNER: Well, you can -- no, I don't
2 think so. I think that hearsay is still absolutely excluded.
3 But *Machado* indicates that you also conduct a 403 analysis,
4 and in that way it is also prejudicial. Why? Because the
5 declarant isn't there to be cross-examined. It is an
6 anonymous e-mail from who knows where and what, so to speak.
7 We don't know who this person is. As I stated --

8 THE COURT: You know where. You don't know
9 who.

10 MR. BUTNER: Yeah. Came from --

11 THE COURT: You know where and when, but not
12 who.

13 MR. BUTNER: Right.

14 THE COURT: The motion in limine is denied.

15 MR. SEARS: Thank you, Your Honor.

16 (Whereupon, this portion of the motion is
17 concluded. Further discussion was held in the p.m. session.)
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JUNE 3, 2010
1:21 P.M.

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THE COURT: We are a bit behind schedule, but is there any issue that you need to raise before we proceed with the defense opening?

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MR. BUTNER: Judge, the State would like to re-urge or ask the Court to reconsider its ruling concerning the e-mail.

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Judge, I didn't have the *Machado* case with me at the time, because I didn't realize we were going to argue that motion at that point in time, but I would urge the Court to reconsider that ruling. I don't think there is a finding as to corroborate the circumstances in this case. I don't think it is appropriate that that e-mail come in. It is prejudicial and confusing to the jury, and obviously is hearsay. So it is inadmissible from that point of view, but the other balancing test is not met.

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THE COURT: Mr. Sears.

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MR. SEARS: I don't have much to add to the arguments I made this morning on that.

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THE COURT: This is something you are intending to discuss in the opening?

MR. SEARS: No.

THE COURT: I will take you up on that, and I will preclude you from discussing it in the opening. I will

1 think about it, Mr. Butner. I appreciate if you are not
2 going to talk about it in your opening, it is not an issue
3 that I need to address momentarily.

4 MR. SEARS: Your Honor, this is concerning to
5 me. I can't even count the number of times the State has
6 been told in advance that something would be argued, and come
7 to court and say, oh, we forgot. We didn't bring our files.
8 We don't have our motion.

9 MR. BUTNER: We weren't told that.

10 THE COURT: I said I would discuss that issue
11 before we got to the point of the opening statements, though.

12 Nonetheless, let's address this specific
13 issue, if you would.

14 MR. SEARS: The specific issue on this is well
15 established. *Machado* takes *Gibson* to another level. We
16 talked about that in detail. *Machado* stands for the
17 principle that 404(b) does not apply. If it doesn't apply,
18 then the burden of proof is on a 404(b) evidence proponent
19 doesn't apply to us in this case.

20 I explained to the Court how I would
21 propose to get it in through the State's own investigator and
22 the investigation he did. The arguments, as Mr. Butner is
23 fond of saying in response to what we often urge the Court,
24 simply goes to the weight that the jury would give to this
25 evidence. It is not absolutely certain at this point, Your

1 Honor, whether this will happen.

2 Remember, Mr. Butner mentioned Mr. Knapp
3 in what I thought was a passingly strange way in his opening
4 statement and told the jury some things about Mr. Knapp. So
5 Mr. Knapp is in this case as we go forward here.

6 The way in which Mr. Knapp is implicated
7 in this e-mail is different. And perhaps it would be
8 appropriate to give you the e-mail, Your Honor, and Randy
9 Schmidt's lengthy departmental report, so you can see how
10 carefully they investigated the entire matter, and what they
11 were and were not able to conclude.

12 In essence, what the State is the saying
13 is if the defendant can't prove that this happened, then they
14 shouldn't be allowed to talk about it. And we know that
15 neither *Gibson* nor *Machado* nor *Holmes versus South Carolina*
16 ever put anything even approaching that burden on the
17 proponent of the third-party culpability like Mr. DeMocker.

18 THE COURT: Neither do any of them directly
19 address the issue of hearsay; do they, and the applicability
20 of hearsay rule to this type of evidence?

21 MR. SEARS: No. But what we have is a very
22 clear holding in *Machado* that says that the only Rules of
23 Evidence that are to govern this are the relevancy rules and
24 403. And they specifically reject the idea that Evidence
25 Rule 404(b) applies. And I think you can read that case

1 fairly, in connection with *Gibson*, and even *Fulminante* going
2 back 32 years, and say that in Arizona there is considerable
3 leeway to be given to a defendant's right to raise that
4 defense. The defendant may not make some claim out of whole
5 cloth and expect to throw it out in front of the jury, but
6 that is not what we have here.

7 THE COURT: I don't think I need, by the way,
8 a copy of the report or the copy of the e-mail. I think I
9 understand what the issue is in connection with that.

10 MR. SEARS: Thank you.

11 The precipitating event which caused the
12 law enforcement investigation, the circumstance, was this
13 anonymous e-mail. But the anonymity of it is part of the
14 story, it is part of the history. Who is this person? How
15 did they make this note? How did the author of that e-mail,
16 who appears to be a real flesh and blood person, come into
17 possession of this detailed knowledge of the crime and the
18 crime scene and the injuries, and describe the injuries in a
19 way that are consistent with what our witnesses and even some
20 of the State's witnesses will have to concede are true facts
21 about the injuries to Carol Kennedy?

22 The possibility, as I will say in a
23 moment in my opening, is that there were multiple instruments
24 used, wielded by multiple assailants. Witnesses can't rule
25 that out. The unifying theory of a golf club is a unifying

1 theory of a golf club, but it is not the only circumstance
2 that would account for the injuries on this poor woman.

3 In addition, the linking of Mr. Knapp to
4 these people tends to run true, because the State is
5 possessed of information from witnesses that Mr. Knapp had a
6 well-documented and well-acknowledged personal problem with
7 prescription drugs. Miss Saxerud said that in her
8 deposition. She described him as being a drug addict. In
9 communications with other people, Mr. Knapp expressed
10 concerns. He was receiving treatment for some form of cancer
11 at the Mayo Clinic. There are entries in Carol Kennedy's
12 appointment calendars where it appears she may have driven
13 him to some of those appointments.

14 And so the idea that Mr. Knapp would
15 somehow run afoul of some criminal activity involving
16 prescription drugs is not farfetched. It is conceivable. We
17 also know a great deal about Mr. Knapp from his own e-mail
18 from our investigation, that he was desperate for money, that
19 he wasn't working, that he went so far as to fall prey to the
20 Nigerian bank scam, Internet scam, and filed a police report
21 where he claimed he was a victim. He approached the DeMocker
22 girls for money after the mother died, and in fact, was paid
23 money by the estate of Carol Kennedy.

24 These are facts well known to the State
25 in this case. So, the idea that Mr. Knapp would somehow

1 perhaps inadvertently involve himself in some very bad
2 activities is not out of the question. So the structure of
3 this whole story has aspects to it that were worthy of the
4 investigation that it was given, but also worthy of
5 discussion to this jury. It is the kind of third-party
6 culpability evidence that can happen.

7 Another way to approach this, Your Honor,
8 would be simply to cross-examine the police officers. Let's
9 talk about leads that you did or didn't follow. What about
10 this one? What about that one? That isn't necessarily
11 something that engulfs third-party culpability. It is simply
12 a question of police practices and investigation. If you ask
13 the officers about these leads, they would have to tell you
14 whether they investigated them or not.

15 And we have any number of those that we
16 have uncovered, and information that we provided to the
17 prosecution about other leads that we think were either not
18 explored at all by the police, because they weren't
19 interested in anyone but Mr. DeMocker, or were inadequately
20 or in an incomplete manner investigated. I think that is all
21 proper cross-examination.

22 MR. BUTNER: Judge.

23 THE COURT: Mr. Butner.

24 MR. BUTNER: The e-mail -- I don't believe the
25 e-mail is listed as an exhibit by the defense.

1 Secondly, I am sure the Court carefully
2 read the *Machado* opinion. There were nine separate
3 corroborating facts that were established by the Court in
4 that. And, I mean, it is an entirely different situation.
5 They even had the identity of the caller who was basically
6 unavailable because he wasn't going to be talking to anybody
7 any further after having made this call.

8 It is a very, very different situation
9 with a lot more corroborating type of evidence than a
10 patently anonymous e-mail from an entirely unknown source.
11 We don't have that in *Machado*. We have a very different
12 situation in the case before the Court right now.

13 And the lack of corroborating
14 circumstances makes this very confusing for the jury and
15 totally unfairly prejudicial in this case. That is the
16 difference.

17 THE COURT: Thank you.

18 Are you ready to proceed, Mr. Sears?

19 MR. SEARS: Yes, Your Honor.

20 THE COURT: I will think about it, Mr. Butner.
21 At this point, it stands as it is.

22 MR. BUTNER: Thank you, Your Honor.

23 (Whereupon, these proceedings were concluded.)

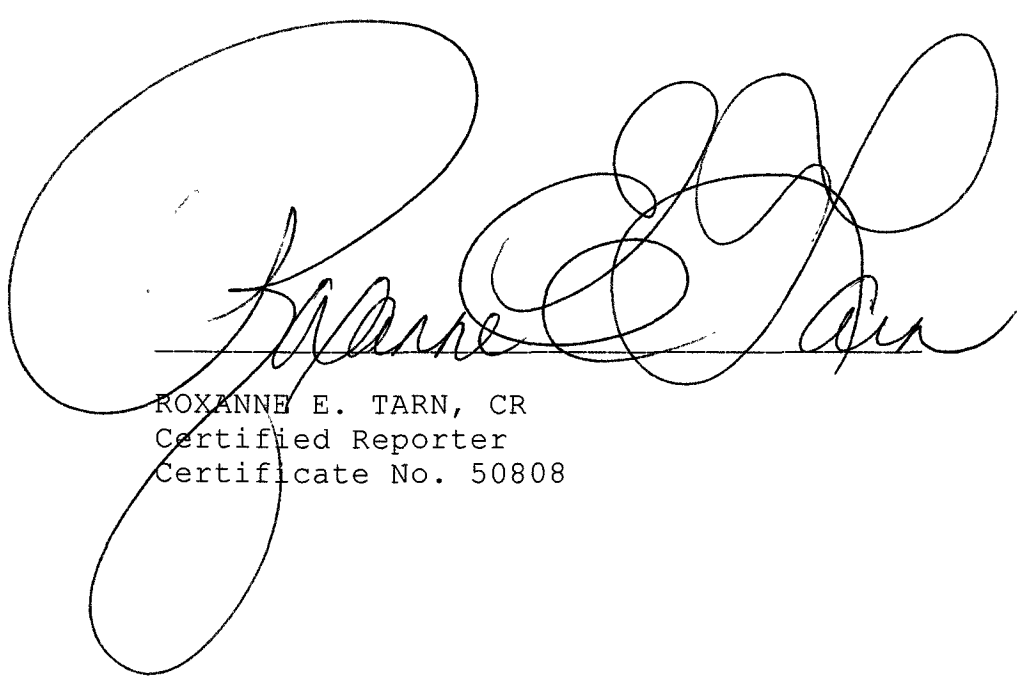
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C E R T I F I C A T E

I, ROXANNE E. TARN, CR, a Certified Reporter
in the State of Arizona, do hereby certify that the foregoing
pages 1 - 19 constitute a full, true, and accurate transcript
of the proceedings had in the foregoing matter, all done to
the best of my skill and ability.

SIGNED and dated this 7th day of June, 2010.

A large, stylized handwritten signature in black ink, appearing to read 'Roxanne E. Tarn', is written over a horizontal line. The signature is highly cursive and loops around itself.

ROXANNE E. TARN, CR
Certified Reporter
Certificate No. 50808